No. 314

October Term, 1934

IN THE

Supreme Court of the United States

REALTY ACCEPTANCE CORPORATION,
Petitioner,

v.

HENRY G. MONTGOMERY.

Petition for a Writ of Certiorari to the Circuit Court of Appeals for the Third Circuit and Brief in Support Thereof.

CHARLES F. OGILBY,
H. RANDOLPH HICKS,
Counsel for Petitioner.

INDEX.

PAGE

PETITION:

Statement of facts 1
Specification of errors 5
Reasons for granting the writ 6
Prayer 7

BRIEF:

Opinion of the court below 9
Jurisdiction 9
Statement 9
Summary of the argument 9
Argument 10

1. THE CIRCUIT COURT OF APPEALS HAD POWER TO REMAND THE CASE TO THE DISTRICT COURT WITH AUTHORITY TO THE DISTRICT COURT TO VACATE THE JUDGMENT AND REOPEN THE CAUSE TO TAKE AND CONSIDER NEWLY DISCOVERED EVIDENCE, AND THIS WITHOUT REFERENCE TO THE EXPIRATION OF THE TERM OF THE DISTRICT COURT AT WHICH SUCH JUDGMENT WAS ENTERED 10

2. THE CIRCUIT COURT OF APPEALS HAD POWER TO AUTHORIZE A NEW TRIAL ON ONE SEPARABLE ISSUE ONLY OF THE CASE, AND THE ISSUE OF "THE QUANTUM OF PLAINTIFF'S DAMAGES" IN THIS CASE WAS A SEPARABLE ISSUE 17

CONCLUSION 20

TABLE OF CASES.

	PAGE
Angle v. United States, 162 Fed. 264	6, 10
Ballew v. United States, 160 U. S. 187, 40 Law Ed. 388	6, 14, 15, 16
Gasoline Products Co. v. Champlin Refining Co., 283 U. S. 494; 75 Law Ed. 688	6, 16, 17
Keyser v. Farr, 105 U. S. 265, 26 Law Ed. 1025	10
Martin v. United States, 17 Fed. (2nd) 973	12
Scott v. United States, 165 Fed. 172	6, 11
United States v. Mayer, 235 U. S. 55	15

TABLE OF STATUTES.

Section 701 Revised Statutes	13, 15
Title 28 of United States Code Sec. 876	13
United States Code Section 2 (a)	13

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REALTY ACCEPTANCE CORPORATION,

Petitioner,

v.

HENRY G. MONTGOMERY.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner, Realty Acceptance Corporation, the defendant in the trial court and hereinafter referred to as the defendant (appellee in the proceeding to which this petition relates), respectfully prays that a writ of certiorari issue to review the judgments or orders of the Circuit Court of ...peals for the Third Circuit entered in the above-entitled ... on July 6, 1931.

STATEMENT OF FACTS.

This petition involves the question of the power of a United States Circuit Court of Appeals in dealing with a case before it on appeal. In the Delaware District Court

Henry G. Montgomery (hereinafter referred to as "plaintiff") sued the defendant at law to recover damages arising from defendant's alleged breach of its contract to employ plaintiff for a term of years as its President. Under a written stipulation the case was there tried to the Court without a Jury. The question as to the enforcibility of the contract and all other legal defenses were determined by the trial court in favor of the plaintiff. Under the principle that the plaintiff's damages were prima facie the contract salary for the balance of the contract term of employment less plaintiff's earnings during such remaining term, plaintiff testified as to his occupation and earnings during such period. Such testimony was the sole testimony as to the quantum of the damages suffered by him and was not controverted by defendant. The trial court entered judgment in favor of the plaintiff for $80,500. Such judgment was entered on May 11, 1929. On June 6, 1929, being at the same term of Court, defendant perfected its appeal to the Court of Appeals for the Third Circuit (Rec. appendix, p. 3). On January 15, 1930, the Court of Appeals handed down a per curiam opinion that the judgment below ought to be affirmed (Rec. appendix, p. 319). While defendant's petition for a rehearing was pending (opinion of Court of Appeals, Rec., p. 71, lines 11-14) (no mandate has yet come down), defendant filed in the Court of Appeals its petition supported by affidavits. Such petition and affidavits set out newly discovered evidence showing that the uncontroverted testimony of the plaintiff in the Court below as to the amounts earned by him during the balance of the contract period of employment was in very material respects incorrect and untrue, and that as a result of such incorrect and untrue testimony he had obtained judgment for a wholly

unwarranted and unjust amount. The petitioner requested leave of the Court of Appeals to ask the District Court to request the Court of Appeals to remand the cause and the record therein to the District Court to the end that it might vacate the said judgment and reopen the said cause for the purpose of taking and considering said newly discovered evidence bearing solely on the quantum of the judgment (Rec., p. 4a). On March 26, 1930, the Court of Appeals entered an order granting such leave and further ordered that all proceedings in the cause then pending in that Court be stayed until after the District Court should have heard and decided the defendant's petition, and if allowed until it should have finally acted upon the matters raised thereby (Rec., p. 5).

Pursuant to such leave, defendant filed its petition supported by affidavits in the District Court. After a full hearing such District Court on June 23, 1930, entered an order that the said Court of Appeals be requested to dismiss the pending appeal without prejudice, and to remand the cause and the record to the District Court, to the end that that Court might vacate the judgment entered therein and on defendant's application reopen the said cause for the purpose of taking and considering the said certain newly discovered evidence bearing solely on the quantum of the said judgment (Rec., p. 52). Such last-mentioned order having been certified to the Court of Appeals, that Court on June 28, 1930, entered an order dismissing defendant's appeal from the said judgment "without prejudice," and remanding the said cause and the record therein to the District Court "to the end that the said District Court may vacate the judgment entered herein and on application of defendant-appellant re-open the said cause for the pur-

pose of taking and considering certain newly discovered evidence bearing solely on the quantum of the said judgment" (Rec., p. 54). Such order of the Court of Appeals having been certified to the District Court, that Court on June 30, 1930, entered an order setting aside the said judgment and reopening the said cause "for the purpose of taking and considering certain newly discovered evidence bearing solely on the quantum of the said judgment" (Rec., p. 59).

The plaintiff thereupon appealed to the Court of Appeals from the last-mentioned order of the District Court. Before this appeal was heard plaintiff also filed a motion in the Court of Appeals asking that Court to vacate its order of June 28, 1930. Plaintiff's appeal and motion were grounded on the contention that the Court of Appeals, notwithstanding the original cause was then pending in that Court, had no authority to authorize the District Court to open the judgment in the trial court and consider such newly discovered evidence because at the time of making such order the term of the District Court at which such judgment was entered had expired.

On July 6, 1931, the Court of Appeals handed down an opinion (Rec., p. 70) and pursuant to such opinion entered two judgments, one (Rec., p. 76) directing that the order of the District Court of June 30, 1930, vacating the said judgment should be reversed, and the second (Rec., appendix, p. 320) directing that the order of the Court of Appeals of June 28, 1930, dismissing without prejudice the first appeal taken by defendant and remanding the cause to the District Court to the end that that Court might open the judgment and hear the newly discovered evidence solely on the quantum of plaintiff's damages, be vacated. In thus vacating its own order, the Court of Appeals appears to have based its action

on the fact alone that the date of such order was after the expiration of the term of the District Court at which such judgment had been entered. This despite the fact that the District Court in setting aside the judgment was not exercising any power qua District Court but only acting under express authority to it from the Court of Appeals which then had sole control of the cause; and despite the fact that Section 701 Revised Statutes was called to the Court's attention.

(NOTE: The record on the original appeal taken by defendant appears as the "appendix" to the record filed with this petition, to avoid expense of reprinting and confusion in repaging.)

SPECIFICATION OF ERRORS.

Your petitioner insists that the Circuit Court of Appeals erred—

1. In holding that because of the expiration of the term of the District Court at which the judgment was entered it was without power to authorize the District Court to vacate the judgment and reopen the cause to hear and consider certain newly discovered evidence bearing solely on the quantum of plaintiff's damages although an appeal had been seasonably taken and was then pending in the Appellate Court.

2. In holding that its order of June 23, 1930, dismissing defendant's appeal without prejudice and remanding the cause to the District Court to the end that that Court might vacate the judgment and reopen the cause for the purpose of taking and considering certain newly discovered evidence bearing solely on the quantum of the said judgment, should be vacated.

REASONS FOR GRANTING THE WRIT.

The reasons why the writ should issue are:

1. The decision of the Circuit Court of Appeals that it was without power to remand the case with leave to the District Court to vacate the judgment and reopen the cause to hear and consider certain evidence discovered after the expiration of the term at which the judgment was entered is squarely in conflict with the decisions of the Circuit Court of Appeals for the Fourth Circuit in *Angle* v. *United States*, 162 Fed. 264, and of the Circuit Court of Appeals for the Fifth Circuit in *Scott* v. *United States*, 165 Fed. 172, both which cases hold that Federal Courts of Appeal have such power. This conflict should be resolved by a decision of this Court. (Rule 38 (5) (b) U. S. Supreme Court Rules.)

2. The Circuit Court of Appeals in this case has decided a Federal question in a way in conflict with applicable decisions of the Supreme Court, to-wit, the power of a Circuit Court of Appeals in a case before it on appeal to make such order or direct such further proceedings to be had by the inferior court as the justice of the case might require; the applicable decisions of this Court being *Ballew* v. *United States*, 160 U. S. 187, and *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U. S. 494; 75 Law Ed. 688.

3. The decision of the Circuit Court of Appeals for the Third Circuit so restricts the powers given it under Section 701 of the Revised Statutes (fully set out in the brief accompanying this Petition) as to largely destroy and impair the power of the Federal Circuit Courts of Appeal to correct manifest wrongs. And it is important that the meaning of said Section should be authoritatively determined by this Court.

PRAYER.

WHEREFORE your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the Circuit Court of Appeals for the Third Circuit commanding said Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in this case which was entitled in that Court: Henry G. Montgomery, plaintiff-appellant v. Realty Acceptance Corporation, defendant-appellee, No. 4506, October Term 1930, to the end that said cause may be reviewed and determined by this Court as provided by Section 240 of the Judicial Code, and that your Petitioner may have such further and other relief or remedy in the premises as to this Court may seem appropriate, and that the order or judgment of the Circuit Court of Appeals entered July 6, 1931, reversing the order of the District Court which opened the said judgment, be reversed; and likewise that the order or judgment of the Circuit Court of Appeals vacating its own order of June 28, 1930, which remanded the cause to the District Court, be reversed.

And your Petitioner will ever pray.

REALTY ACCEPTANCE CORPORATION,
By CHARLES F. CURLEY,
R. RANDOLPH HICKS,
Counsel for Petitioner.

STATE OF DELAWARE,
NEW CASTLE COUNTY, } *ss.:*

CHARLES F. CURLEY, being duly sworn, says that he is counsel for Realty Acceptance Corporation, the petitioner and that he prepared the foregoing petition, and that the allegations thereof are true as he verily believes.

CHAS. F. CURLEY.

SWORN to and subscribed before me this fifteenth day of August, A. D. 1931.

MARGARET A. MURPHY,
Notary Public.

(Notary Seal)

BRIEF IN SUPPORT OF THE PETITION.

Opinion of the Court Below.

The opinion of the Circuit Court of Appeals for the Third Circuit was handed down on July 6, 1931, and has not yet been reported. It appears in the Record (Rec., p. 70).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, now appearing as Section 347 (a) of Title 28 of the United States Code Annotated.

Statement.

A statement of the facts and of the errors assigned will be found in the petition for certiorari.

SUMMARY OF THE ARGUMENT.

I.

THE CASE BEING IN THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT ON APPEAL, THAT COURT HAD POWER TO REMAND THE CASE AND THE RECORD THEREIN TO THE DISTRICT COURT WITH AUTHORITY TO THE DISTRICT COURT TO VACATE THE JUDGMENT APPEALED FROM AND REOPEN THE CAUSE TO TAKE AND CONSIDER CERTAIN NEWLY DISCOVERED EVIDENCE, AND THIS WITHOUT REFERENCE TO THE EXPIRATION OF THE TERM OF THE DISTRICT COURT AT WHICH SUCH JUDGMENT WAS ENTERED.

II.

THE CIRCUIT COURT OF APPEALS HAD POWER TO AUTHORIZE A NEW TRIAL ON ONE SEPARABLE ISSUE ONLY OF THE CASE, AND THE ISSUE OF "THE QUANTUM OF PLAINTIFF'S DAMAGES" IN THIS CASE WAS A SEPARABLE ISSUE.

ARGUMENT.

THE CASE BEING IN THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT ON APPEAL, THAT COURT HAD POWER TO REMAND THE CASE AND THE RECORD THEREIN TO THE DISTRICT COURT WITH AUTHORITY TO THE DISTRICT COURT TO VACATE THE JUDGMENT APPEALED FROM AND REOPEN THE CAUSE TO TAKE AND CONSIDER CERTAIN NEWLY DISCOVERED EVIDENCE, AND THIS WITHOUT REFERENCE TO THE EXPIRATION OF THE TERM OF THE DISTRICT COURT AT WHICH SUCH JUDGMENT WAS ENTERED.

It is clear that after the appeal to the Circuit Court of Appeals was perfected all jurisdiction over the case was transferred from the District Court to the Court of Appeals, *Keyser* v. *Farr,* 105 U. S. 265, 26 Law Ed. 1025. Defendant's appeal was perfected at the same term at which the judgment appealed from was entered (Rec., appendix, p. 3). In the present case the Court of Appeals then having exclusive control of the appealed case, had ample power to authorize the District Court in the manner shown by its order of June 28, 1930.

In *Angle* v. *United States,* 162 Fed. 264, a situation somewhat similar to the one which confronted this Court in entering the order now challenged by this appeal was presented to the Judges of the Fourth Circuit. In that case the Court of Appeals was petitioned to modify its judgment of affirmance so that it would appear that

> "while the judgment of the court below is affirmed, it is remanded with leave to the court below to exercise its discretion in the matter of granting a new trial, on the ground of evidence discovered after the expiration of the term at which the judgment of conviction was entered, and after the cause had been removed to the

Circuit Court of Appeals by writ of error. Under the procedure as now established, in the absence of permission given by this court, it will be the duty of the court below, after it has received the mandate of this court affirming the judgment complained of, to see that the same is carried into execution."

Continuing, the Court said:

"It therefore becomes our duty by an examination of the affidavits in which the after discovered evidence is set forth to determine whether or not the petitioner has presented for our consideration such facts as will authorize us to suggest to the court below the propriety, in the light of the record of this cause, of hearing and of disposing of the motion for a new trial so far as the petitioner Angle is concerned." . . .

"While it is entirely proper for an appellate Court, in a case where the facts justify it, to remand a case with leave to the court below to hear a motion for a new trial, or to entertain further proceedings therein, nevertheless, in the case we now consider, we find it to be our duty to decline to modify the judgment complained of and to deny petitioner's prayer."

In *Scott* v. *United States,* 165 Fed. 172, the Circuit Court of Appeals for the Fifth Circuit said:

"The suggestion is made that if the case can be remanded to the Circuit Court, with authority to the trial judge to readjust the sentences, a compromise advantageous to both parties can be made. For authority for this court to affirm a sentence and yet remand, with instructions to the trial judge to exercise his discretion in modifying any sentence formerly imposed, we are

referred to the cases of Angle v. United States (C. C. A.) 162 Fed. 264, United States v. Wynn (C.C.) 11 Fed. 57, and Bates v. United States (C.C.) 10 Fed. 92.

"Unquestionably cases may arise in which similar authority may well be exercised, if the court has before it (and from the record) the circumstance to warrant action. For instance: If the case shows that a motion for a new trial on newly discovered evidence should be passed upon, or that a sentence is erroneous as beyond the statute, or the trial judge himself suggests that a mistake has been committed which he desires to correct. See section 701, Rev. St. U. S. Perhaps we could grant the relief asked for in this case under the authorities suggested; but we prefer to base our action upon the consent of the government, as shown by the acknowledgment appended to the petition above given.

"The judgment of the Circuit Court is affirmed, and the cause is remanded to the Circuit Court, with instructions to the trial judge herein to exercise his discretion in modifying any sentence which has heretofore been imposed upon the plaintiffs in error in this case."

Further, the Court of Appeals for the Fifth Circuit as late as March, 1927, again stated the same proposition in *Martin* v. *United States,* 17 Fed. (2d) 973 at 976, when it stated:

"The District Court had lost jurisdiction to entertain a motion for a new trial at the time the so-called confession of perjury was made, and may now exercise its discretion to grant or refuse a new trial only by the consent of this Court. We have no doubt that upon a proper showing it would be our duty to authorize the District Court to exercise that discretion."

Section 701 Revised Statutes, together with the application of such Section by the Supreme Court to Circuit Courts of Appeal, seems to entirely control the question here raised. Section 701 R. S. reads as follows:*

> "The Supreme Court may affirm, modify, or reverse any judgment, decree, or order of a circuit court, or district court acting as a circuit court, or of a district court in prize causes, lawfully brought before it for review, or may direct such judgment, decree, or order to be rendered, or such further proceedings to be had by the inferior court, as the justice of the case may require. The Supreme Court shall not issue execution

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*NOTE: In Section 876 of Title 28 of United States Code which is intended to be a restatement of Section 701 R. S., an obvious error was made in omitting the words "circuit court, or district court acting as a circuit court," so that Section 876 of Title 28 seems to be limited to "a district court in prize causes." Notwithstanding this incorrect restatement in the Code, Section 701 R. S. is in effect for all purposes, because Section 2 (a) of the United States Code provides:

> "The matter set forth in the Code, evidenced as hereinafter in this section provided, shall establish prima facie the laws of the United States, general and permanent in their nature, in force on the 7th day of December, 1925; but nothing in this Act shall be construed as repealing or amending any such law, or as enacting as new law any matter contained in the Code. In case of any inconsistency arising through omission or otherwise between the provisions of any section of this Code and the corresponding portion of legislation heretofore enacted effect shall be given for all purposes whatsoever to such enactments." (Underscoring ours.)

in a cause removed before it from such courts, but shall send a special mandate to the inferior court to award execution thereupon."

In *Bollew* v. *United States*, 160 U. S. 187, Chief Justice White after referring to Section 11 of the Act of March 3, 1891 (Act creating the United States Circuit Courts of Appeal), at page 201 of the report used the following language:

"With reference to the newly established courts, in section 11 of the act it was provided as follows:

'And all provisions of law now in force regulating the methods and system of review through appeals or writs of error shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the Circuit Courts of Appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error.'

"It thus conclusively appears that the authority of this court to reverse, and remand with directions to render such proper judgment as the case might require, upon writs of error in criminal cases, to state courts and to the Circuit Courts in capital cases, was confessedly conferred by express statutory provisions, and that a like power was conferred upon the Circuit Courts of Appeals and Circuit Courts in cases where they exercised jurisdiction by error in criminal cases over the District Court."

"From this and from a review of the legislation on the subject of the powers conferred upon this court as a reviewing court, it follows as a necessary conclusion that general authority was given to it on writ of error to take such action as the ends of justice, not only in civil but in criminal cases, might require."

It will be noticed that the objective of Chief Justice White was to show that a power which concededly by the statute was exercisable by both the Supreme Court and the Circuit Courts of Appeal in civil causes was exercisable also in criminal cases. It is earnestly submitted that *Ballew v. United States* shows conclusively that under Section 701 R. S., *supra*, a Circuit Court of Appeals as well as the Supreme Court "may direct such judgment . . . to be rendered, or such further proceedings to be had by the inferior court, **as the justice of the case may require.**"

From the foregoing it clearly appears that the Circuit Courts of Appeal for the Fourth Circuit and for the Fifth Circuit were right in their above cited holdings, and conversely, that the Circuit Court of Appeals for the Third Circuit in the present case was wrong in holding that the expiration of the trial term at which the judgment appealed from was entered left it without authority to make its order of June 28, 1930. The Court of Appeals for the Third Circuit states in its opinion that it is controlled by the decision of this Court in *United States* v. *Mayer*, 235 U. S. 55. That decision simply held that a District Court had no power to modify its judgment after the expiration of the term at which such judgment was entered. Here the Circuit Court of Appeals ignores the above quoted decisions of the Circuit Courts of Appeal for the Fourth Circuit and for the Fifth Circuit. It makes no reference to our argument that at the time of its order of June 28, 1930, the case was exclusively in that Court, and that the District Court in opening the judgment was exercising not any power of its own but only the authority given to it for the purpose by the Court of Appeals which then had exclusive control of the case. In the case in the Fourth Circuit and in the two

cases in the Fifth Circuit, the judgment term of the trial court had expired and yet both courts affirmatively asserted their power to authorize a new trial by the trial court. Such decisions are squarely in conflict with the decision of the Court of Appeals in this present case.

That the newly discovered evidence complied with the requirements of due diligence on defendant's part and was material on the issue of plaintiff's damages are questions affirmatively decided in this case by both the Court of Appeals and by the District Court.

Such decision of the Court of Appeals for the Third Circuit is also squarely in conflict with the decisions of this Court in *Ballew* v. *United States, supra*, and in *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U. S. 494; 75 Law Ed. 688. The Court of Appeals below in its opinion ignores the language of Section 701 Revised Statutes (previously quoted herein) as well as this Court's decision in *Ballew* v. *United States* (hereinbefore quoted from) to the effect that Circuit Courts of Appeal as well as the Supreme Court were authorized, not only to examine, modify or reverse any judgment of a District Court, but also to direct or authorize any further proceedings in the inferior Court as the justice of the case might require. Section 701 Revised Statutes as well as this Court's decision in *Ballew* v. *United States* appeared upon petitioner's brief in the Court below.

In *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U. S. 494; 75 Law Ed. 688, the Circuit Court of Appeals for the First Circuit had vacated the judgment of the District Court but set aside the verdict only as to damages and had remanded the case to the District Court for a new trial on the question only of the damages of de-

fendant below under its counterclaim. This Court, while affirming the power of a Circuit Court of Appeals to award a new trial on one separable issue only, nevertheless reversed the Court of Appeals for the First Circuit on the ground only that in that case the issue of defendant's damages under its counterclaim was not an issue separable from the other issues in that case. In that case, as in this, the judgment term of the District Court had expired. It is submitted that the order of June 28, 1930, of the Court of Appeals for the Third Circuit in this present case was in substance the same as the order of the Court of Appeals for the First Circuit in that case. In that case the judgment was vacated by the Court of Appeals; in this present case the Court of Appeals authorized the District Court to so vacate. In that case the verdict was set aside only as to defendant's damages under its counterclaim and in all other respects affirmed; in this present case the District Court was authorized to set aside the verdict as to plaintiff's damages only. What was there done was what was here done except as to form only. This Court recognised as proper that Court's proceedings save as to the separable quality of the issue upon which the new trial was authorized.

THE CIRCUIT COURT OF APPEALS HAD POWER TO AUTHORIZE A NEW TRIAL ON ONE SEPARABLE ISSUE ONLY OF THE CASE, AND THE ISSUE OF "THE QUANTUM OF PLAINTIFF'S DAMAGES" IN THIS CASE WAS A SEPARABLE ISSUE.

In *Gasoline Products Co. v. Champlin Refining Co., supra*, this Court upheld the power of a Court of Appeals to direct a new trial on one separable issue only. This Court said:

> "Here we hold that where the requirement of a jury trial has been satisfied by a verdict according to law upon one issue of fact, that requirement does not compel a new trial of that issue even though another and separable issue must be tried again."

This Court reversed, however, because the issue of "defendant's damages under its counterclaim" was "so interwoven with that of liability that the former could not be submitted to the jury independently of the latter without confusion and uncertainty"; as stated by this Court the dates of the contracts there alleged to have been breached and the date of the breach had not been found by the jury and such dates were material to any determination of such damages.

In this present case the issue of the "quantum of the judgment" to which the new trial was limited, was not related to, connected with or dependent upon any other fact or law issue in the case. The action here was for damages for the alleged breach of an employment contract whose term was five years from a specified date, at a specified annual salary. (Rec., appendix, p. 9.) In the pleadings the defendant admitted the execution of the contract and of course its date; likewise its repudiation (claimed to be justified) of such contract, and the date of such repudiation. (Rec., appendix, pp. 30-40.) The trial court in its "findings and verdict" (Rec., appendix, p. 188 at bottom) said: "As the contract was valid and as it has been broken by the defendant, the plaintiff is entitled to a judgment for his damages. The measure of damages for the breach is the contract price unpaid, less the sums, if any, shown in mitigation of damages." All defenses legally justifying its alleged breach of its contract were rejected by the District

Court whose decision as to such was affirmed by the Court of Appeals. The salary for the balance of the contract term was, of course, a fixed amount, and hence the only issue to be determined was the amount in mitigation to be deducted therefrom, namely, the amount of plaintiff's earnings during the remainder of the contract term. Under the order of the Court of Appeals of June 28, 1930 the District Court was authorized to determine anew the amount of plaintiff's damages because the after-discovered evidence showed that the plaintiff's earnings after the breach were very much greater in amount than testified to by him at the trial. This is shown by the Court of Appeals in its opinion, where it states: "On the issue of damages the plaintiff proved his loss without testifying, in mitigation of damages, to money he had earned after his discharge, which, if earned, he was, of course, bound to state." (Rec., p. 70 at bottom.) Again the Court of Appeals in referring to the newly discovered evidence stated in its opinion: "*This evidence as presented by the defendant's verified petition and not controverted by the plaintiff* tended to prove that the plaintiff had since his discharge earned a substantial sum of money concerning which at the trial he did not testify in mitigation of damages, and that the discovery was made under circumstances which, as to the defendant's diligence, brought it within the rule of after-discovered evidence." (Rec., p. 71, 18th line.)

The Court of Appeals below in its opinion stated (Rec., p. 74, lines 13-17) it made a mistake in authorizing the District Court to have a new trial on this one issue without first requiring defendant to show that the matter was of a kind triable on a single issue. We do not know what the Court of Appeals intended by this statement. It refrains

from stating that such issue was not a separable one. It is submitted that such a statement was relatively impossible. The hearing on defendant's petition for leave in the Court of Appeals proceeded on the unquestioned basis that every issue of law and fact in the case was foreclosed against the defendant except the single issue of the amount of plaintiff's earnings after his discharge. The after-discovered evidence related exclusively to the amount of such earnings. The order of the Court of Appeals of June 28, 1930, expressly confined the new trial to the "quantum of the said judgment," which in this case necessarily limited the new trial issue to the amount of plaintiff's earnings after his discharge. The issue of the "quantum of the said judgment" in this case was clearly a separable issue within this Court's decision in *Gasoline Products Co.* v. *Champlin Refining Co.*

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the order or judgment of the Circuit Court of Appeals for the Third Circuit entered July 6, 1931, reversing the order of the District Court which opened the said judgment, should be reversed; and also that the order or judgment of the Circuit Court of Appeals entered July 6, 1931, vacating its own order of June 28, 1930, which remanded the cause to the District Court with authority to reopen, should be reversed.

CHARLES F. CURLEY,
R. RANDOLPH HICKS,
Counsel for Petitioner.